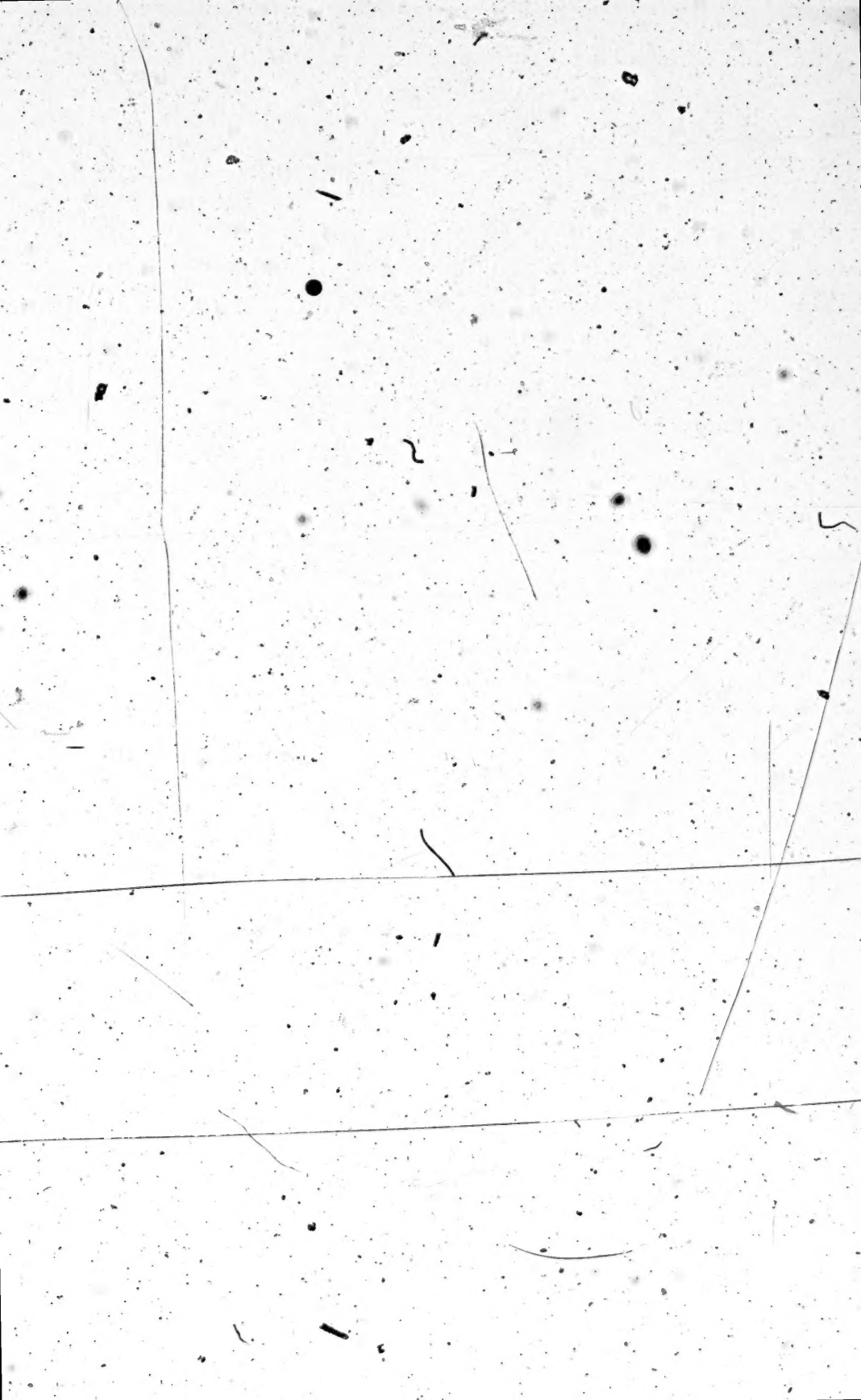

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In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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No. 1025

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not deliver a written opinion. Its oral opinion is contained in the Appendix at page 33.

JURISDICTION

The judgment of the district court was entered on November 3, 1970 (A. 33–34). A notice of appeal to this Court was filed on November 4, 1970 (A. 34–35). On March 1, 1971, this Court postponed consideration of the question of jurisdiction to the hearing on the merits (A. 35). For the reasons set forth in part I of the Argument, *infra*, we submit that this Court has jurisdiction over the appeal under 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under the Criminal Appeals Act (as applicable prior to its recent amendment) to entertain a direct appeal from a district court decision dismissing an indictment on the ground that the statute upon which it is based is invalid as applied to all members of Congress.

2. Whether (a) the speech or debate clause or any other constitutional provision prohibits Congress from enacting a statute providing for the judicial trial and punishment of members who accept bribes in exchange for the performance of legislative acts and (b) if no constitutional prohibition exists, whether the statute here in issue constitutes a valid exercise of Congressional power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the Constitution provides in pertinent part:

> ***for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place.

18 U.S.C. 201 provides in pertinent part:

> (a) For the purpose of this section:
>
> "public official" means Member of Congress [the Delegate from the District of Columbia], or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by

authority of any such department, agency, or branch of Government, or a juror;

* * * * *

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

* * * * *

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act * * * [shall be guilty of an offense].[1]

* * * * *

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; * * * [shall be guilty of an offense].[2]

---

[1] A violation of 18 U.S.C. 201(c)(1) is punishable by imprisonment for not more than fifteen years and a fine of $20,000 or three times the monetary equivalent of the thing of value constituting the bribe. See 18 U.S.C. 201(e).

[2] A violation of 18 U.S.C. 201(g) is punishable by imprisonment for not more than two years and a maximum fine of $10,000. See 18 U.S.C. 201(i).

Prior to its amendment effective January 2, 1971 (84 Stat. 1890), 18 U.S.C. (Supp. V) 3731, provided in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> * * * * *

STATEMENT

Appellee, a former United States Senator, was charged in five counts of a ten-count indictment with the solicitation and acceptance of bribes in violation of 18 U.S.C. 201(c)(1) and (g) (A.1–7).[3] The essence of the charges was that, during his tenure as a Senator and in his capacity as a member of the Senate and the Senate Committee on the Post Office and Civil Service, appellee solicited and accepted bribes in

[3] Appellee was named in counts 1, 3, 5 and 7 as having violated Section 201(c)(1) and in count 9 with violating Section 201(g). The remaining counts of the indictment charged Cyrus Anderson and Spiegel, Inc., with offering and giving the bribes in violation of 18 U.S.C. 201(b).

amounts totaling $24,000 from Cyrus T. Anderson, the Washington, D.C. lobbying representative of Spiegel, Inc., a large mail order firm, in return for his being influenced in the performance of official acts with regard to postage rate legislation.

On November 3, 1970, the United States District Court for the District of Columbia (Hart, J.) granted appellee's pre-trial motion to dismiss the indictment on the ground that the Speech or Debate Clause of the Constitution shielded him "from any prosecution for alleged bribery to perform a legislative act" (A. 33).

SUMMARY OF ARGUMENT

I. This Court has jurisdiction of this appeal under the Criminal Appeals Act, 18 U.S.C. (Supp. V) 3731. Indeed, its authority to hear this case rests upon two independent provisions of that Act.

The order of the district court dismissing the indictment was thus "based upon the invalidity * * * of the statute" within the meaning of the second paragraph of Section 3731, as construed in *United States* v. *Knox*, 396 U.S. 77, 79 n. 2. The order is also appealable as a "motion in bar" under the fourth paragraph of the jurisdictional statute. See *United States* v. *Weller*, No. 77, this Term, decided February 24, 1971.

II. We thus turn to the question posed by the merits—whether the indictment of appellee under the instant bribery statute violated the speech or debate clause or any other constitutional provision. We argue that it did not.

We first trace the relevant history of the clause and urge that it amply supports the view that Congress has the constitutional power itself to punish bribe taking members. Our conclusion in this regard is fully buttressed by the history leading to the adoption of the clause in England and its application by the Colonial Assemblies. It is also clear that the founders did not intend by that provision to render that power the exclusive prerogative of Congress. On the contrary, the contemporary evidence shows that it was recognized that Congress in the exercise of its legislative authority could utilize the courts to try and punish corrupt members. We further stress that no other constitutional provisions point the other way; we argue that the contrary is true.

We further contend that paramount considerations of policy strongly support the clear constitutional authority. We point to a variety of significant reasons in this respect—not least among them the fact that a legislative body by its very nature and purpose is not geared to try a criminal charge, particularly against a member, where popular passions rather than impartial justice may carry the day.

We finally argue that the statute under which appellee was indicted was within the "narrowly drawn" test articulated in *United States* v. *Johnson*, 383 U.S. 169, 185. It is thus sufficient in our view to meet the *Johnson* requirement if a statute gives reasonable notice of the conduct proscribed—as the one here involved clearly does—and represents a deliberate congressional decision announced in a criminal statute—

as is also the case here—that a member who violates the public trust should be tried in a court of law. In sum, it is our position that the decision below has unduly restricted the authority of Congress to define, by legislation, the circumstances which warrant punishment of its members.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS APPEAL

The Court's order of March 1, 1971 postponed consideration of the question of jurisdiction "to the hearing of the case on the merits" (A. 35). Accordingly, we turn first to that question, and urge that the Court's jurisdiction in this case is fully sustainable under either of two discrete provisions of the Criminal Appeals Act, 18 U.S.C. (Supp. V) 3731.[4]

A. The first applicable provision is the second paragraph of Section 3731. That paragraph provides, in pertinent part, that a direct appeal to this Court may be taken from the decision of a district court dismissing an indictment where the decision is "based upon the invalidity * * * of the statute upon which the indictment * * * is founded." This Court held last Term that an appeal is authorized under this

[4] The 1970 amendment to the Criminal Appeals Act, 84 Stat. 1890—which we printed as an Appendix to our Reply Memorandum in response to appellee's Motion to Dismiss or Affirm—is not applicable to the present appeal since by its own terms that amendment does not apply to cases "begun in any district court before its effective date," *i.e.*, January 2, 1971. See *United States* v. *Weller*, No. 77, this Term, decided February 24, 1971, slip op. p. 1, n. 1.

language to review a decision that a statute cannot constitutionally be applied to a particular class of cases, irrespective of its admitted validity in other contexts. *United States* v. *Knox*, 396 U.S. 77. In that case, an indictment under 18 U.S.C. 1001 for misstatements in wagering tax forms had been dismissed prior to trial on grounds of self-incrimination; the district court did not, of course, purport to invalidate the statute—which is of broad general application in other situations. This Court found jurisdiction, saying (396 U.S. at 79, n. 2):

> The District Court sustained the claim of privilege not on the basis of facts peculiar to this case but on the basis of its conclusion that the Fifth Amendment provides a defense to any prosecution under § 1001 based on misstatements on a Form 11–C. This amounts to a holding that § 1001, as applied to this class of cases, is constitutionally invalid. The generality of the impact of the District Court's holding appears to us to render our jurisdictional holding *a fortiori* compared to analogous jurisdictional holdings in such cases as *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Fleming* v. *Rhodes*, 331 U.S. 100, 102–104 (1947); *Wissner* v. *Wissner*, 338 U.S. 655 (1950); *Department of Employment* v. *United States*, 385 U.S. 355, 356–357 (1966). * * *

The situation in the present case is the same. The district court did not dismiss the charges against appellee because of any facts special to this case, but rested its decision upon the broader ground that the underlying statutes (18 U.S.C. 201(c)(1) and (g))

could not be constitutionally applied against *any* member of Congress who accepts a bribe in exchange for legislative conduct. The district court accordingly invalidated these statutes as applied to a particular definable class; under *Knox*, the jurisdiction of this Court is therefore properly invoked.

B. Alternatively, the fourth paragraph of Section 3731 establishes the Court's authority to entertain the instant appeal. That provision permits a direct appeal to this Court from a district court decision "sustaining a motion in bar, when the defendant has not been put in jeopardy." This pre-trial dismissal came before any jury was impanelled and thus before appellee was "put in jeopardy." See *United States* v. *Jorn*, 400 U.S. 470, 473–478. The only remaining question is whether the order sustained a motion in bar. That it did is confirmed by this Court's recent holding in *United States* v. *Weller*, No. 77, this Term, decided February 24, 1971. In *Weller*, the Court stressed that the statutory phrase "motion in bar" "must be taken to mean whatever was meant by a 'special plea in bar' in the Act as originally passed in 1907" (slip op. at 5). The Court stated (*id.* at 6):

> A characteristic common to all these definitions is that a special plea in bar did not deny that a defendant had committed the acts alleged and that the acts were a crime. Rather, it claimed that nevertheless he could not be prosecuted for his crime because of some extraneous factor. A situation in which the defendant claims that his act was simply not a crime would be beyond the scope of this test.
>
> Our decisions are consistent with this reading of the "motion in bar" provision. In early cases

> under the section, the most familiar plea in bar interposed the statute of limitations. * * * In other cases defendants have claimed immunity because of prior self-incriminatory testimony or a statutory grant of immunity. *United States* v. *Blue*, 384 U.S. 251; *United States* v. *Hoffman*, 335 U.S. 77, 78; *United States* v. *Monia*, 317 U.S. 424. * * *

The present case falls within this interpretation. Appellee's motion to dismiss was premised on the proposition that, whether or not he had committed the acts constituting a crime under 18 U.S.C. 201, he was immune from prosecution because he had a congressional privilege. This is therefore a classic case of confession and avoidance—and the avoidance was based on the "extraneous factor" of constitutional privilege. Thus, the district court sustained a motion in bar within the intent of the Criminal Appeals Act.

In sum, this case is properly here on direct appeal, and we accordingly turn to the merits.

II. CONGRESS HAS THE CONSTITUTIONAL POWER, PROPERLY EXERCISED IN THE STATUTE HERE INVOLVED, TO PROVIDE FOR THE JUDICIAL TRIAL AND PUNISHMENT OF A MEMBER WHO TAKES A BRIBE IN EXCHANGE FOR THE PERFORMANCE OF A LEGISLATIVE ACT

A. THE DECISION IN UNITED STATES V. JOHNSON

This Court decided in *United States* v. *Johnson*, 383 U.S. 169, that the speech or debate clause bars a prosecution under a general criminal statute (in that case for conspiracy under 18 U.S.C. 371) which calls into question the legislative conduct of a member of

Congress.[5] At the same time, however, the Court was most careful to exclude from the reach of its decision prosecutions bottomed not upon a criminal provision of general applicability as in *Johnson*, but instead upon a statute in which Congress, in the exercise of its power to legislate, had expressly authorized judicial prosecution and conviction of its members for corrupt practices. As to the latter class of prosecutions, the Court stated (383 U.S. at 185):

> * * * [W]ithout intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

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[5] *Johnson* involved a Congressman's conviction for conspiring to impair lawful government functions by accepting a bribe to make a speech on the floor of the House of Representatives. The speech was charged as part of the conspiracy (383 U.S. at 184) and extensive evidence concerning its contents and Jonhson's motive in giving it was introduced at trial (383 U.S. at 173–176).

In his opinion concurring on this aspect of the case, Mr. Chief Justice Warren (joined by Justices Douglas and Brennan) read the Court's decision as a "limited holding * * * that the use of the Congressman's speech during this particular trial—with an examination into its authorship, motivation and content—was violative of the Speech or Debate Clause" (383 U.S. at 186–187).

Whatever the precise limits of *Johnson*, we do not contend that the clause protects only speech. "Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.'" *Powell* v. *McCormack*, 395 U.S. 486, 502, quoting in part from *Kilbourn* v. *Thompson*, 103 U.S. 168, 204.

This case presents the issue left open in *Johnson*: whether Congress may constitutionally enact a statute specifically providing for judicial trial and punishment of a member who accepts a bribe in exchange for performance of legislative acts. We will contend in the remainder of this Brief that Congress has such power, that its exercise is compatible with controlling constitutional provisions, and that the statute in issue here constitutes a proper exercise of the legislative power which is reserved to Congress under Article I Sections 1 and 8.

B. THE PERTINENT BACKGROUND OF THE SPEECH OR DEBATE CLAUSE

Our brief in the *Johnson* case (No. 25, October Term, 1965, pp. 19–24), outlined the historical roots and the development of the speech or debate clause. This Court's opinion in that case also canvassed that history (383 U.S. at 173–183). In the Court's words (*id.* at 178), the clause:

> * * * was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators [footnote omitted]. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. * * *

We agree with this assessment of the history and nature of the legislative privilege as far as it goes. But the present inquiry—which was specifically

avoided in the *Johnson* decision—requires a further examination of the relevant history as a guide to the intentions of the Framers in the present context. In particular, it requires consideration of the correlative development of the legislative power to punish legislators' improprieties, as well as the abuses of legislative power during the Eighteenth Century.

1. At the close of the Seventeenth Century, as a corollary of Parliament's success in obtaining the right of free speech and debate, it also acquired the unchallenged power to punish offenses by its members against the order and integrity of its proceedings. Indeed the exercise of such authority was deemed to be an essential attribute of Parliamentary supremacy and was an integral part of the struggle for free speech and debate.

One of the earliest recorded instances of the exercise of this institutional authority occurred in 1576. Peter Wentworth, a member of the House of Commons, had verbally attacked the Queen in a manner deemed offensive by the House. A committee of all privy councillors was appointed to examine him and, pursuant to its report, Wentworth was committed to the Tower. Wentworth again incurred the displeasure of the House when he and others introduced a motion suggesting that the Speaker or a member could not interrupt another member's speech. For this offense, Wentworth was again imprisoned.[6] Subsequently, in

[6] After he secured the Queen's pardon and acknowledged his fault at the bar of the House, Wentworth was ultimately released from custody. Taswell-Langmead, *English Constitutional History* (Eleventh ed., Plucknett, 1960) 314.

1694 (five years after the incorporation of freedom of legislative speech and debate in the English Bill of Rights) one Lord Falkland, a member of Commons, was found guilty of accepting 2,000 pounds from the Crown in return for his votes and was committed to the Tower of London during the pleasure of the House.[7] Perhaps an even more notorious case involved the Speaker of the House of Commons, Sir John Trevor, who in 1695 was found guilty of charges of bribery.[8]

By the early Eighteenth Century Parliament had succeeded in establishing its almost exclusive authority to try members accused of taking bribes in connection with their official responsibilities.[9] This power to impose sanctions upon members was obviously a necessary corollary of the right of untrammeled legis-

[7] Luce, *Legislative Assemblies* 401 (1924).

[8] *Id.*, at 402. Another instance of punishment for corrupt behavior occurred in 1714, when Sir Robert Walpole, a member of the House of Commons, was expelled and imprisoned by the House on charges of corruption. Taswell-Langmead, *supra*, at 584. Bribery was frequently brought to the attention of the House during the course of its investigation of disputed elections, and when the evidence indicated an election had been secured by corrupt means the House normally directed the attorney general to commence a prosecution. Cushing, *Legislative Assemblies*, 217, 251, 258–268, 423 (1856). See also May, *The Law, Privileges, Proceedings and Usage of Parliament* (Fourteenth ed. Campion 1946), 51, 103, 104, 428–432, and 438–440.

[9] There is some indication that this power was not totally exclusive. One English historian has suggested that a member of Parliament who was found guilty of bribe-taking not only forfeited his seat, but was also "liable to prosecution in the same manner as bribed voters, and persons corrupting them

lative debate; otherwise a single legislator could, with impunity, disrupt or dishonor the legislative processes the privilege was designed to protect. It is clear that Parliament at no time doubted its plenary authority to regulate the conduct of its members; misconduct was regarded as a breach of privilege and treated as a contempt.[10] In short, the immunity afforded by the privilege of speech and debate offered an offending member no protection whatsoever against the authority of Parliament to question and punish his behavior.

The developing *lex parliamenti* soon become subject to abuse, and during the Eighteenth Century Parliament sought to expand its privileges to encompass matters that would not normally be deemed to be

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* * *." Bowyer, *Constitutional Law of England*, 90 (Second ed., 1846). This treatise was cited with approval by this Court in discussing the legislative privilege from arrest in *Williamson* v. *United States*, 207 U.S. 425, 442.

Apparently, Bowyer's view was predicated on the ruling of Lord Mansfield in *Rex* v. *Pitt*, 3 Burr. 1335 (1767), that bribery at election of members of Parliament was always a crime punishable at common law. See also, *Myddelton* v. *Wynn*, 125 Eng. Rep. 1339, 1344 (Ex. Ch. 1745). This notion was the basis of later Commonwealth cases that a legislator was amenable to trial and punishment by the courts for taking a bribe in connection with his official duties. See, *e.g.*, *Rex* v. *Boston*, 33 C.L.R. 386 (1923, Australia); *Regina* v. *White*, 13 S.C.R. 322 (1875; N.S.W.); *Regina* v. *Bunting*, 7 Ont. Rept. 524 (1885, Canada). See note 22, *infra*, p. 22.

[10] The privilege of speech or debate was thus invariably asserted in a manner which reserved to the legislative body the power to impose sanctions upon individual members. See, *e.g.*, Section 19 of the Bill of Rights of 1689, declaring that "the freedom of speech or debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." May, *Law of Parliament* (Seventh ed. 1873), 113, 115–116.

within the legislative sphere.[11] As this Court described this development in *Watkins v. United States*, 354 U.S. 178, 188, see also *id.* at 189–191 both Houses of Parliament "claimed absolute and plenary authority over their privileges," the right to declare "what those privileges were," what "new privileges were occasioned," and "what conduct constituted a breach of privilege." And the legislative privileges were subject to use or sale for the personal gain of members.[12]

Moreover, it was not long before the Crown devised means to use the parliamentary privileges indirectly in its own efforts to control legislation. "Votes which were no longer to be controlled by fear, were purchased with gold."[13] An example of this abuse was

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[11] It thus could authoritatively be stated that in the Eighteenth Century Commons "could take cognizance of almost any offense under the *lex parliamenti*, punish it as a breach of privilege, and thus invade the field of jurisdiction that rightly belonged to the judges of the *lex terrae*." Wittke, *The History of English Parliamentary Privilege* (1921) 200; see also Taswell-Langmead, *supra*, 321–322, 580–582.

[12] For example, resting upon its basic privilege that its members were free from civil arrest or molestation, Commons successfully asserted the power to punish trespass on the estates of members, theft of their goods or those of their servants and the arrest of their servants. Additionally, members of Commons and their servants were declared to be outside the reach of the common law courts during the time that Parliament was sitting. This led to the sale of "protections" issued under the seal of particular members, providing in effect that named persons were servants of the member and should be free from arrest, imprisonment and molestation, during the term of Parliament. See Wittke, *supra*, at 56–57, 63–67; Taswell-Langmead, *supra*, 321–322, 580–582.

[13] 1 May, *The Constitutional History of England* 300 (1889). For a fuller discussion of the technique of government by corruption in Eighteenth Century England, see the Brief for the

revealed in the celebrated case of John Wilkes. After Wilkes had successfully invoked the parliamentary privilege in defense against the Crown's attempt to prosecute him for publication of an allegedly seditious document, the royally controlled Parliament found that his acts constituted a breach of the privilege. Wilkes' battle with both the Crown and Parliament lasted some twenty years before he won an ultimate victory. One scholar has described the lesson of Wilkes' case as follows:

> [Wilkes] had directed popular attention to the royalty-controlled House of Commons, and pointed out its unrepresentative character, and had shown how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned.[14]

2. By the time the colonial assemblies began to function in this country, the authority of Parliament to regulate the conduct of its members had become established tradition, and the colonial legislatures followed the path made by Parliament. The power to punish members was assumed as part of the legislative privilege, and only two assemblies appear to have specifically requested such power in their petitions for privilege to their governors. Such a request was included in the Speaker's Petition of the New York assembly in 1717, and a similar request was made by the

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United States in *Johnson*, No. 25, October Term, 1965, pp. 26–30.

[14] Wittke, *supra*, at 22; *id.* at 115–120. See also this Court's discussion of Wilke's case in *Powell* v. *McCormack*, 395 U.S. 486, 527–531.

speaker of the North Carolina assembly during the same period; even these two colonial assemblies had, however, previously exercised the power without seeking formal recognition.[15]

Members of the colonial legislatures were frequently punished by censure, admonition, fine or imprisonment. For example, the Maryland assembly in 1642 subjected those of its members who did not appear at the legislature by a specified time to a penalty, and other assemblies frequently imposed fines upon members for unexcused absence from the house. Fines were sometimes regarded as insufficient and were supplemented by the arrest and censure of an offending member.[16]

At the same time, the colonial assemblies were also guilty of the types of abuse that had infected Parliament's exercise of its authority.[17] In this setting, it is hardly surprising that clashes between governors and colonial assemblies occurred: the former seeking to

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[15] Clarke, *Parliamentary Privilege in the American Colonies* (1943) 73–74. In addition to specific rules governing proceedings, some assemblies enacted more general regulations providing for the discipline of members by a variety of penalties, including censure, fine and imprisonment. Clarke, *supra*, at 184 and, generally, at 173–204.

[16] See Clarke, *supra*, at 177, 181–182. In Connecticut, as early as 1639, a fine of ten pounds could be levied for an infraction of the legislative rule against divulging assembly secrets or delivering legislative papers without permission; in North Carolina the penalty could be expulsion. *Id.* at 182. In Virginia, drunkeness of a member was punishable by a fine of 100 pounds of tobacco. *Id.* at 181.

[17] See, *e.g.*, Clarke, *supra*, particularly at pp. 15–22, 29–58, 72, 93–131, 237–261; see also Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691, 780 (1926).

restrain what was deemed to be legislative invasion of Executive authority; the latter seeking to press their power as far as possible.[18]

3. When the framers adopted the speech or debate clause, they were fully aware of this total development—both the benefits of uninhibited legislative speech and the dangers of unfettered and corrupt use of legislative power. They undeniably welcomed and encouraged legislative freedom unencumbered by interference from the other branches of government, for such freedom benefitted the constituency being represented.[19] On the other hand, they were acutely troubled that this power could be grossly abused and corrupted—as had been the case in England and in some instances in the colonial assemblies; they desired no repetition of such excesses in the federal Congress. The Wilkes affair was fresh in their minds (see

[18] For example, in New York in 1727, the assembly and the governor became embroiled in a sharp controversy which was temporarily resolved by dissolution of the assembly. During the next assembly, the treatment of members at the hands of the governor was vigorously protested. One member was imprisoned for insisting he was accountable only to the assembly for any act done in it. By resolutions, the assembly declared that this act of imprisonment was the most extreme violation of its privileges. Clarke, *supra*, at 95, see also 93–131, 237–261.

[19] The Massachusetts Constitution of 1780 had thus provided: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential *to the rights of the people* that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever" [Part The First, Art. XXI, emphasis added]. See 1 Poore, *Constitutions and Charters*, 956, 959 (1878). See for a similar formulation the New Hampshire Constitution of 1784, Part I (The Bill of Rights), Article XXX, 2 Poore, *supra*, 1280–1283. See also *Coffin* v. *Coffin*, 4 Mass. 1, 27, 28.

Powell v. *McCormack, supra,* 395 U.S. at 530–531) as were the activities of George III in gaining control of Commons in the Revolutionary War by financial and other means.[20] Nor did they overlook the real danger that unless there was some internal restraint, Congress might emulate Parliament and certain of the colonial assemblies, by seeking to utilize the legislative power to encroach upon other Departments, thus "passing the limits assigned to it."[21]

These concerns coalesced in the adoption of the speech or debate clause. The central aim of course, was to retain the critical, indeed indispensable, guarantee of legislative independence. The immunity conferred by the clause was intended to prevent legislative intimidation by, or accountability to, other branches of government. Immunity from such potential harassment, whatever its form, "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation," *Powell* v. *McCormack, supra,* 395 U.S. at 503. Moreover, the clause serves "the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States* v. *Johnson, supra,* 383 U.S. at 178. Yet the framers were

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[20] One of the framers thus pointedly noted that it was "notorious, that [legislators] are more frequently the representatives and instruments of the executive magistrate, than the guardians and advocates of the popular rights." *The Federalist,* No. 56, (Hamilton or Madison) p. 387 (Bourne ed. 1914).

[21] See *United States* v. *Johnson, supra,* 383 U.S. at 178, quoting Madison in *Federalist* No. 48. See also *United States* v. *Brown,* 381 U.S. 437, 443–444.

also alert to the fact that government by legislative corruption or legislative overreaching was no fanciful danger; and that unless kept within legitimate bounds legislative power could sap the integrity of the governmental process. Their writings repeatedly expressed this fear of legislative excess. Madison pointed out that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." He believed that specific obstacles had to be erected against the possible abuse of power by the Congress. See *The Federalist*, No. 48, pp. 338–340 (Bourne ed. 1914). See also, *The Federalist*, Nos. 49, 56, 73. In the same vein, Jefferson wrote to Madison in 1789 that "[t]he tyranny of the legislatures is the most formidable dread at present, and will be [so] for long years." See *Tenney* v. *Brandhove*, 341 U.S. 367, 375 n. 4; *United States* v. *Brown*, *supra*, 381 U.S. at 443–444, and note 17.

It is against this framework that the purpose of the speech or debate clause must be evaluated. In providing that speech or debate in either House "shall not be questioned in any other Place," it was thus not simply meant that Congress could impose sanctions on the unruly legislator or on one who violated its rules of behavior. It was also meant that Congress could itself punish a corrupt and venal member—that it could exercise a power that had always been one of the essential factors in the overall struggle for legislative freedom of debate. Indeed, the Founders could rely upon contemporary history in concluding

that the danger of bribery was of real and immediate concern. Correspondingly, the Founders were intimately aware from immediate history that the legislative power was subject to easy abuse and that "barriers had to be erected to ensure that the legislature did not overstep the bounds of *its* authority and perform the functions of the other departments." *United States* v. *Brown, supra,* 381 U.S. at 444 (emphasis in the original). In sum, the Framers clearly recognized that Congress would have the authority to punish its members for acts of bribery connected with legislative duties. It is equally sound to conclude that the Framers had no objection to, and perhaps even deemed desirable, congressional use of its legislative authority under Article I Section 1, and the "necessary and proper clause", Article I Section 8, to enact a statute specifically providing for a trial in the courts of a member who takes a bribe; such a statute avoids the likelihood of a trial influenced by popular clamor and the lack of impartiality necessarily inherent in a legislative body where "all the passions which actuate a multitude" may be felt. See *The Federalist,* No. 48, pp. 383–384, quoted in *United States* v. *Brown, supra,* 381 U.S. at 443, 444.[22]

[22] Accordingly, there is no basis for reading the speech or debate clause as embodying any concept—comparable to the *lex parliamenti*—that Congress has exclusive authority to punish members for taking bribes. The *lex parliamenti*—Parliament's broad authority to punish offenses to its dignity or integrity in many instances to the exclusion of the courts (but see note 9, p. 15, *supra*) was not taken over into American jurisprudence. See *Watkins* v. *United States*, 354 U.S. 178, 192. See also, *Anderson* v. *Dunn*, 6 Wheat. 204.

C. NO CONSTITUTIONAL PROVISION BARS CONGRESS FROM MAKING IT A CRIME FOR A MEMBER TO ACCEPT A BRIBE

Our discussion so far has indicated that the freedom of legislative speech or debate necessarily includes the unfettered power of Parliament itself to punish a member for violations of its rules, including the acceptance of a bribe in exchange for legislative conduct: the adoption of the speech or debate clause in the Constitution underscored that this authority was given to Congress. If any further support for this proposition is necessary[23] one need only refer to Article I, Section 5 of the Constitution[24] and the recent decision of this Court in *Powell* v. *McCormack*, *supra*.

The Court held in *Powell* that the House of Representatives is without power to *exclude* any member-elect who has met the constitutionally required standing qualifications contained in Article I, Section 2, clause 2, rejecting the claim that what transpired in that case was tantamount to expulsion under Article I, Section 5. What is especially pertinent here is the fact that in the course of its opinion the Court made it clear that "Congress has an interest in preserving its institutional integrity, * * * [which] in most cases * * * can be sufficiently safeguarded by the exercise of its

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[23] The district court here indicated doubt as to Congress' power in this regard, apparently reasoning that Congress could not punish its own members for bribery and hence could not grant that authority to the courts (see A. 27).

[24] That provision reads: "* * * Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a member."

power to punish its members for disorderly behavior and, in extreme cases, * * * expel a member with the concurrence of two-thirds" (395 U.S. at 548). See also, *e.g., Kilbourn* v. *Thompson*, 103 U.S. 168. Indeed, that power has been utilized in the past—albeit with a light hand—to deal with corrupt members and those who otherwise violate their legislative responsibilities.[25]

With its own power incontestable, the question remains whether Congress may by statute empower the regular judicial tribunals if—as was not the situation in the conspiracy statute involved in *Johnson*—it defines specifically the circumstances which warrant punishment of its members and fixes the appropriate penalties. We perceive no constitutional impediment to the enactment of such a statute by Congress in the exercise of its basic legislative power; the only question is whether Congress has expressly done so.

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[25] See Senate Misc. Doc. 278, 53d Cong., 2d Sess., *Digest of Decisions and Precedents of the Senate and House of Representatives of the United States Relating to their Powers and Privileges Respecting their Members and Officers* (1894), especially at pp. 85–190. See also, III Hinds' *Precedents of the House of Representatives*, 145–165 (1907); Kirby, *Congress and the Public Trust*, 202–230 (1970); Senate Misc. Doc. 67, 52d Cong., 2d Sess., *Senate Election Cases*, 713–759.

While punishment of its members has been limited to censure, fine, or expulsion (see, *e.g.*, Kirby, *supra*, 202–210; III Hinds, *supra*, 795–860, 1114–1142), we see no reason why imprisonment would not also be an appropriate remedy. See *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 189–190: "* * * [T]he Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment * * *."

In *Burton* v. *United States*, 202 U.S. 344, this court affirmed the conviction of a United States Senator for agreeing to receive and actually receiving compensation for services in relation to a mail fraud proceeding pending before the Post Office in violation of Section 1782 of the Revised Statutes, 13 Stat. 123. Although no speech or debate issue was involved, it was urged that the statute was invalid because it conflicted with Article I, Section 5, by which "the Senate is made * * * the sole judge of the qualifications of its members, and, with the concurrence of two-thirds, may expel a Senator from that body" (202 U.S. at 366). The Court squarely rejected this claim; it held that "there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named" and that "it was never contemplated that the authority of the Senate to admit [a member] to a seat in its body * * * or its power to expel him after being admitted, should, in any degree, limit * * * the authority of Congress to enact" statutes otherwise within its legislative competence (202 U.S. at 367). This decision is particularly important in the instant context since it holds that judicial prosecution of a Member of Congress under a conflict-of-interests statute is constitutionally valid.[26]

This Court has upheld analogous legislation (now 2 U.S.C. 192, originally enacted in 1857)[26] providing for the trial in a court of law of a witness whose

[26] It is noteworthy that the statute involved in *Burton* was passed some 3 years after the precursor of the statute involved in this case. See *infra*, p. 28.

behavior during the course of a congressional investigation was contumacious [27] (*In re Chapman*, 166 U.S. 661, 671–672; [28] *Jurney* v. *MacCracken*, 294 U.S. 125, 151–152) even though Congress had been held to have inherent authority to punish a nonmember for contempt. Thus, it is clearly established that Congress may enact a statute providing for judicial enforcement of its inherent powers.

As we have argued, there is no room for doubt that Congress can punish its own members for corrupt practices in the performance of legislative acts; it may also, we submit, constitutionally make such behavior a crime triable in a court. As we have shown in the preceding section, such a use of its legislative authority is fully consistent with the purposes of the speech or debate clause; by definition it is no impairment of the power of Congress.

Sound considerations of policy support the authority

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[27] This legislation was directly prompted by the refusal of a newspaperman to divulge to the House of Representatives the names of those Congressmen who he claimed in the press were soliciting bribes on matters pending in the House. See *Watkins* v. *United States*, 354 U.S. 178, 207–208 n. 45.

[28] The Court held in *In re Chapman*, *supra*, that even though Congress could itself have punished the contempt, it could enact a statute in this regard "for carrying into execution the powers vested in Congress and each House thereof." 166 U.S. at 671.

While Congress does not possess the scope of the power enjoyed by the English Parliament to punish nonmembers for contempt, it has been held to have that power under certain circumstances. See *Anderson* v. *Dunn*, 6 Wheat. 204, 233; *Kilbourn* v. *Thompson*, 103 U.S. 168; cf. *Marshall* v. *Gordon*, 243 U.S. 521, 543–544 (dictum).

of Congress to provide for judicial trials of corrupt members. To begin with, legislative machinery is not geared to resolve the sensitive issues of guilt and innocence, particularly where that determination in large measure requires inquiry into what transpired outside of the legislative chamber. Indeed, the 1857 contempt statute discussed above was adopted in part to avoid the difficulties necessarily inherent in a legislative trial. Cf. *In re Chapman*, *supra* at 671.[29] Another practical reason (perhaps of greater significance) supporting a judicial trial is that a conviction thus obtained permits "the imprisonment of a contemnor beyond the expiration of the current session of Congress." *United States* v. *Bryan*, 339 U.S. 323, 327.

The most fundamental policy consideration militating against a legislative trial, however, is that such a trial is apt to be influenced by political factors extraneous to considerations of justice in a particular case. In reviewing the underlying purpose of the Bill of Attainder Clause, this Court has remarked "that the

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[29] The report of the 53d Congress in 1894, containing an exhaustive analysis of Congressional investigations of charges against members reflects the frustration of both Houses with the interminable delays occasioned by these investigations and the resulting delay of passing upon more pressing public business. This report indicates that experience showed Congress to be ill suited to perform the functions of a judicial tribunal. See Senate Misc. Doc. 278, *Digest of Decisions and Precedents of the Senate and House of Representatives Relating To Their Powers and Privileges Respecting Their Members and Officers*, 53d Cong., 2d Sess., particularly at pp. 23–25, discussing the investigation of Senator John Smith's alleged involvement in the Aaron Burr conspiracy.

Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons," *United States* v. *Brown*, 381 U.S. 437, 445, and authorities cited at note 19.[30]

In enacting the original precursor to 18 U.S.C. 201 and 203 (Act of February 26, 1853, c. 81, 10 Stat. 170, 171),[31] Congress indicated awareness of this danger; indeed the argument in favor of the legislation was that it was necessary so that Congress might regulate its conduct in response to an established rule of law rather than "the capricious judgment of friend or foe."[32] No mention was made during the debate of the speech or debate clause; much less was there any suggestion that this legislation would in any way conflict with or undercut the protections afforded by the

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[30] As one recent commentator has pointed out, "Congress itself has been notoriously slow and exceedingly reluctant to apply its own palliatives to situations of legislative slander. In the entire course of this country's existence only eighteen attempts were made by Congress to purge itself of what Congress considered 'unhealthy' elements." Oppenheim, *Congressional Free Speech*, 8 Loyola L. Rev. 1, 27; see also Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. Pa. L. Rev. 960, 972–973 (1951).

[31] As it read in 1853 the statute made it a crime for a member of Congress to accept a bribe "to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity * * *."

[32] See 30 Cong. Globe 288–297, particularly at 291. See similarly the debate on the subsequent statute of 1862, 12 Stat. 577, 60 Cong. Globe 3260–3261.

clause. Congress was concerned precisely with avoiding the dangers of legislative abuse which so troubled the Framers, and it was to that end that judicial trials of allegedly corrupt members were authorized by this statute. The result was to insure greater protection to the public interest and the institutional interest of Congress, as well as the interest of the Congressman involved. His conduct is subject to censure only if a grand jury returns an indictment charging betrayal of the public trust, and the impartiality of the judicial tribunal protects him from a politically motivated judgment. Concomitantly, the use of the judicial process promotes public confidence in the integrity of Congress since such a procedure evinces a deliberate legislative decision to try one of its own in a nonpolitical forum over which it has no control.

D. THE STATUTE INVOLVED IN THIS CASE IS A VALID EXERCISE OF CONGRESSIONAL POWER

We submit that 18 U.S.C. 201—the statutory provision under which appellee was indicted—meets the constitutional standard suggested in *Johnson, supra,* 383 U.S. at 185 of "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." Thus this statute does not suffer from the crucial defect that *Johnson* found in the general conspiracy statute, since it leaves no room whatever for doubt that Congress has intended expressly to exercise its legislative power in this specific area of bribery of a member.

We have already discussed the fact that in adopting the precursors to the present statute, Congress

expressed no doubt of the legitimacy of its authority to do so, nor, as far as our research has shown, did any member express concern that the legislation would encroach upon the legislative freedom of speech or debate. After the passage of more than a hundred years, the same congressional acceptance appeared when Congress comprehensively revised the bribery, graft and conflict-of-interest laws in 1962, so as to incorporate the prohibition on bribery of its own members expressly in the general prohibitions relating to "public officials" (18 U.S.C. 201(a), *supra*, p. 2). Once again, there was no suggestion that Congress thought that such legislation might in any way restrict the freedom of congressional speech or action; and it was under this statutory framework that appellee was indicted. In short, if the view of Congress as to the scope of its own powers is a relevant consideration in assessing the constitutional validity of the instant statute—as it undoubtedly is in the present context where the exclusivity of congressional power is in issue—the present legislation passes muster.

The bribery statute not only expresses the specific congressional intent to utilize its legislative authority to provide judicial trials with respect to unlawful acts of members and reflects the view of Congress that this serves the purposes of the constitutional grant of legislative autonomy; it also defines with precision the crime itself. Section 201(c)(1) prohibits a Congressman from accepting anything of value for the performance of an official act and section 201(g) in effect simply prohibits the Congressman from soliciting or

accepting a bribe. There can be no question that these provisions meet the traditional standards for assessing vagueness;[33] attacks on that basis have been uniformly rejected. *United States* v. *Kenner,* 354 F. 2d 780 (C.A. 2), certiorari denied, 383 U.S. 958; *United States* v. *Irwin,* 354 F. 2d 192 (C.A. 2), certiorari denied, 383 U.S. 967. Moreover, if it is contended that these provisions are overbroad in a First Amendment sense (see *United States* v. *Johnson, supra,* 383 U.S. at 182, note 12), then we can conceive of no statute directed at punishing a member of Congress for taking a bribe that would be constitutionally valid. What the statute punishes is, of course, not the making of any speech or the performance of any legislative act, but the taking or soliciting of a bribe.[34]

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[33] As said in *United States* v. *National Dairy Corp.,* 372 U.S. 29, 32–33:

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States* v. *Harris,* 347 U.S. 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. * * *"

See also *United States* v. *Vuitch,* No. 84, this Term, decided April 21, 1971.

[34] It has been suggested (Note, *The Bribed Congressman's Immunity from Prosecution,* 75 Yale L. J. 335, 347–348) that the bribery statue permits punishment "upon evidence of intent only" since it does not literally require that the bribe have actually passed or the service have been actually performed; thus, it is said, the statute is susceptible of prosecutorial abuse for the executive's political ends. But the Note concedes that no such prosecutions had been found, and we are aware of none; the instant indictment alleges that both the bribe and the services were carried out.

We urge, in sum, that Congress has the power to prohibit such bribery of its members, that it may specifically exercise that power under its plenary authority to legislate, and that it has done so in this statute which narrowly defines the crime for which members may be prosecuted by the executive and punished by the courts.[35]

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[35] No more restrictive test of effective legislation makes any realistic sense. If an unscrupulous prosecutor were out "to get" a particular member of Congress, he might be able to secure groundless charges of tax evasion or other crimes unrelated to official duties. But such a possibility has never warranted the adoption of a rule of absolute congressional immunity from such charges. See, *e.g.*, *Burton v. United States*, *supra*; *May v. United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830. By the same token, the remote possibility that prosecutorial discretion might be abused where improper legislative conduct is involved should not be held to outweigh the public interest in prosecuting a Congressman who accepts a bribe in exchange for a legislative act where Congress in its legislative judgment has made that act a crime.

CONCLUSION

Both on constitutional and statutory grounds the court below erred in dismissing the indictment against appellee. For the reasons stated, the judgment of the district court should be reversed and the cause remanded with directions to reinstate the dismissed counts.

Respectfully submitted.

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